IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

1.CIVIL WRIT No. 1457 of 1986

OM PRAKASH & ORS
V/S
BOARD OF REVENUE & ORS

2.CIVIL WRIT No. 1103 of 1986

L.RS.OF BALU THROUGH HEERA & ORS
V/S
STATE & ORS

Mr. NS ACHARYA, for Om Prakash & Ors.

Mr. LR MEHTA & Mr. SAJJAN SINGH,for L.Rs.of Balu & Ors.

Mr. OP BOOB, & Mrs. RR KANWAR, AGAs.

Date of Order : 15.3.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

These two petitions have been filed by either parties, i.e. the plaintiffs and the defendants, against the common judgment of the learned Board of Revenue dt. 8.4.1986. Writ No. 1457 of 1986 has been filed by the plaintiffs, while Writ No. 1103 has been filed by the defendants. The plaintiff is challenging the part of the order, whereby the learned Board of Revenue dismissed the part of the suit, relating to the land comprised in Khasra No. 42 and 86, while the defendants have filed writ petition challenging the part of the order, decreeing the

plaintiffs' suit, with respect to the land comprised in Khasra No. 44.

Before proceeding with the judgment I am constraint to observe, that the present litigation is an unique example of the litigation, initiated way back on 13.5.1949, with respect to the aforementioned three parcels of land, and the dispute started virtually from the day one of the grant of right for the land, as plaintiffs claim under a Bapi Patta, while the defendants claim under a Gair Bapi Parcha, being of the year 1949 and 1948.

The facts of the case are, that the plaintiffs filed a suit for possession and compensation against the defendants, which suit was subsequently amended, and written statement was filed to the original suit as well as to the amended suit. Then, a rejoinder was filed. The averments of the plaint are, that the plaintiffs No. 1 and 2 along with Chuna and Samela etc. were granted a Bapi Patta by Tehsildar, Jodhpur on 22.2.1949, regarding Khasra No. 42, 44, 58 and 86, total measuring 152 Bigha & 18 Biswa. These lands were in possession of the grantees in samvat year 2005. It was then alleged that Chuna and Samela alienated their rights to one Ram Chander. It was then alleged that the defendants also filed an appeal against this granting of Patta before Dy. Commissioner, which was dismissed on 27.4.1949, and the order of Tehsildar was

upheld. According to the plaint, in absence of the plaintiff, the defendants started interfering in Khasra No. 86, and wanted to forcibly encroach upon the well, whereupon application was filed before Tehsildar for restraining the defendants from so interfering, which stay was vacated on 15.4.1949. However, the defendants forcibly took possession over the land of Khasra No. 86, and started cultivating also, on coming to know of it the plaintiffs asked the defendants to desist, and on their declining the suit is being filed. Then, a plea was raised about damage being suffered by the plaintiffs. It was then pleaded that the cause of action arose to the plaintiffs when the defendants started encroaching upon the land, and also started taking steps for getting Patta. Interalia with these averments a decree was prayed for possession of the land being Khasra No. 42, 44 and 86, and also for damages and future compensation.

The stand of the defendants in the amended written statement was, that the order of Tehsildar to grant Patta is still subjudice in appeal, and the effecting of mutation is stayed, and therefore, it is wrong that the plaintiffs are granted Bapi Patta, and the plaintiffs have no right to file suit on the basis of that Patta. It was then pleaded, that these lands were never in cultivatory possession of Chuna and Samela, and Gair Bapi Parcha produced by the plaintiffs dt. 13.11.48 is wrong, rather in view of the

defendants' cultivation, Gair Bapi Parcha was granted to defendants, and was entered in Girdawari, but the plaintiffs, in collusion with the Government officials, got issued Gair Bapi Parcha in their name, and remark was managed about the entry in favour of the defendants having been made erroneously. In such circumstances, plaintiffs have no right to maintain the suit on the basis of such Patta. Then, the alienation by Chuna and Samela was denied for want of knowledge, and being unregistered, and therefore, being not admissible in evidence. Then, it was pleaded that the land was never in possession, rather it was in possession of the defendants only, and therefore, there is no question of defendants' cultivating the land of Khasra No. 86 in absence of plaintiffs, and that since Ram Chander was not in possession, they had no right to get any injunction, and therefore, the injunction was vacated. It was also pleaded, that on account of the plaintiffs getting injunction, the defendants' standing crop was destroyed, for which they claimed damages. Interalia with these pleadings it was pleaded that the suit be dismissed.

A rejoinder was filed by the plaintiffs, contending that no proceeding is subjudice regarding grant of Patta dt. 22.2.1949, nor any mutation has been stayed, and that the alienation by Chuna and Samela is valid. Then, it was pleaded that the defendants Balu fraudulently got issued Gair Bapi Parcha regarding Khasra No. 42 and 86 on

11.11.1948, which was set aside on 13.11.1948 itself, and other pleadings taken in the plaint were reiterated. It was also pleaded that even the Revenue Board has found, that Patta was validly granted by the Tehsildar.

During trial various documents were filed by the parties, and oral evidence was also led. However, the defendant Balu did not appear in the witness box.

Learned trial court, vide judgment dt. 2.1.1978 decided the suit, and decreed the same. However, the controversy raised before the learned trial court was about Tehsildar's right to issue such Patta, and that issue was separately decided, which matter was carried upto this Court, and this Court in D.B. Civil Writ Petition No. 375/61, decided on 26.8.1965, reported in 1966 RLW-427, held that Tehsildar had power to grant Patta. However, on merits the learned trial court framed issues, viz. about alienation being not admissible in evidence for want of registration, and about the plaintiffs being entitled to decree for possession for Araji 42, 44 and 86, on account of the defendants' possession being illegal, and the other issue was about the plaintiffs' entitlement to get compensation.

It was noticed by the learned trial court, that a Gair Bapi Parcha was issued in favour of the defendants on

11.11.1948, but then another Patta was issued in favour of the plaintiffs on 13.11.1948, and that, there was a report of the Patwari, and the order of the Revenue Inspector, noting that a Gair Bapi Parcha was erroneously happened to be issued in favour of the defendants, which was duly sanctioned, and the compliance was reported. It was also noticed, that appeal against grant of Patta was dismissed on 27.4.49. Then, further appeal was dismissed on 23.2.1953, and the Board also upheld these orders, and these orders have not been challenged any further in any other court. It was noticed, that it is during this interregnum period, that on account of the defendants' taking possession illegally, that the suit has been filed. It was noticed that during the pendency of the appeal against Patta, the defendant Balu applied for being granted permission to cultivate, but that permission was not granted. Likewise 145 Cr.P.C. proceedings were also initiated by Chunilal, Munidas etc. against Ram Chander, wherein the land was got attached, but then those proceedings were dropped on 12.1.54, and the possession was delivered to Ram Chander. Thereafter Balu initiated 145 proceedings, and got the land attached. Thus, it was noticed that there is a long drawn series of litigation. Then, the learned trial court also noticed, that the defendant No.2 Karnia filed a separate written statement, admitting that the possession of Balu is illegal, and in that regard an agreement was executed on 27.6.50, and was

got registered on 20.7.50. Then, it was considered, that Chuna and Samela had alienated their right to Ram Chander, original document whereof is also on record, and after death of Ram Chander, his widows Godawari and Jamna sold the land to the plaintiff Pratap and his sons, after permission. Then, it was considered that the litigation is going on for the last 28 years, and during this period the proceedings remained pending in various courts, and the trial had to be ordered to be expedited. Then, coming to the issues; deciding issue No.1 it was held, that the mutation has been effected in favour of the plaintiffs, as is apparent from Girdawari, and Sarpanch Madan Lal, despite being member of community of defendant Balu, admitted, that the land revenue for one or two year was paid by Pratap, and that defendants have nothing to do with Khasra No. 44, and thus it was found, that since land is mutated in favour of the plaintiffs, issue No. 1 was decided in favour of the plaintiffs. Then, considering issue No.2, about validity of Patta, on the ground, other than jurisdiction of Tehsildar, it was considered that apart from issuance of Gair Bapi Parcha in the name of Balu, there is no material on record to show the defendants' possession, much less any circumstance to show the defendants' possession, immediately before. It was also considered, that the Collector, in the order dt. 9.4.1952, has also held that the defendants had not been able to show any right except that they had Gair Bapi Parcha with them, while the grant

of Patta in favour of the present plaintiffs negatives the importance of Gair Bapi Parcha, and that the conduct of Hawaldar, who granted this Gair Bapi Parcha is also suspicious. Then, it was also found that from the perusal of the record it is clear, that the defendants have failed to show any basis, on the basis of which they could get Gair Bapi Parcha, and nothing has been placed in rebuttal to show, as to on what basis the Patta can be said to be illegal, apart from the question of jurisdiction. Thus, this issue was also decided in favour of the plaintiffs. Then, the issue No. 3, about Chuna and Samela being necessary party, was also decided in favour of the plaintiffs. Then, deciding issue No. 4 regarding admissibility of the sale deeds, it was noticed, that regarding the earlier alienation in favour of Ram Chander, it has been also held, while deciding issue No. 3, that want of registration does not adversely affect the right of the plaintiffs, and vide order dt. 27.6.59, the plaintiffs' right under the alienation has been recognised, and that order has not been assailed. Then, deciding issue No. 5 it was considered, that the Patta has been upheld in appeal after appeal, and obviously therefore, in view of the title also, the plaintiffs are entitled to decree for possession. Evidence led on the side of the parties was also considered, and the plaintiffs' title was upheld. In the result the suit of the plaintiffs was decreed.

Against this judgment & decree dt. 2.1.1978, an appeal was filed by defendant Balu, before the learned Revenue Appellate Authority, which was allowed vide judgment dt. 8.1.1979. The learned Revenue Appellate Authority, in para-4 has cataloged the material available on record, and has noticed, that the defendant No.2 submitted two contradictory written statement, and that he has no interest in the suit, while Balu remains the only contesting defendant, who contested the suit. Learned Revenue Appellate Authority prefaced the finding by judgment of Hon'ble the Supreme Court in Brahma Nand Vs. Neki Puri reported in AIR 1965 SC-1506, that in a suit for ejectment the plaintiff has to succeed or fail on the title that he establishes, and that, he can not succeed on the weaknesses of the defendant, and therefore proceeded to pose a question, about the plaintiff's title to bring the suit, requiring to be determined, and then proceeded to discuss the plaintiffs claim of title on the basis of Patta Ex. P-3 dt. 24.2.49, which was originally issued in the name of Chuna, Samela, Udaram and Omprakash, and considered, that therefore, the validity and legality of this document is to be determined. Then reference was made to the rules, being the “Rules for Bapidars and Gair Bapidars” prevailing at the relevant time in Marwar State before the Marwar Tenancy Act came into force, and then quoted the definition of Tenants, Gair Bapidar, Occupying, and Bapidar, and proceeded to conclude, that occupation of

land was a pre-requisite for becoming tenant, may be even without the consent of the ruler, and that, such tenants who did not hold Bapi Patta were known as Gair Bapidars, and they could apply and obtain a Bapi Patta, and that it was essential for granting Patta, that the person concerned should be a tenant, and should have been in occupation of the land. It was considered, that admittedly, defendants were granted Gair Bapi Parcha on 11.11.1948, i.e. more than three months before the grant of Patta, and this grant of Gair Bapi Parcha shows, that the defendants were already in occupation of the land in question, and in absence of anything to show, that the defendants ever surrendered possession, or having been ejected by the landlord, no Patta could be granted to the plaintiffs, and with this assumption, it was considered, that neither Patwari nor Revenue Inspector was competent to cancel the Gair Bapi Parcha, which they tried by Ex.P-4, Ex. P-5, and Ex.P-6, and that any such cancellation, without actual ejectment, according to law, is meaningless. Then it was also considered, that Patwari and Revenue Inspector were not called in the witness box to prove orders, and that neither Gair Bapi Parcha dt. 11.11.48 has been cancelled, nor any notice for cancellation has been given to the defendants. Thus, it was held, that in view of defendants being possessed of Gair Bapi Parcha, coupled with actual possession, conferred better right and title, in comparison to Bapi Patta, without occupation of land. Thus, on this

ground it was held, that Patta could not be legally issued in respect of the land under occupation of the defendant, for which they were holding Gair Bapi Parcha. Then alternatively it was considered, that even if Patta is considered to have been legally issued, what rights accrue to the plaintiffs, and in this regard the documents of alienation being sale deeds Ex. P-21 and Ex.P-22, and Ex.P-23, were considered, and then proceeded to consider, that in sale deed Ex. P-21 there is no mention of delivery of possession, and therefore, it is nothing but is a waste paper, as it is not registered, and that this document has also not been proved according to law, by producing the seller, the purchaser, or the witness, in the witness box. Then, evidence of Pratapji was considered in this respect, and it was disbelieved that the possession was delivered. It was also considered that when the Patta was issued in the name of four persons, how two of them could sell their unspecified share. Then, regarding Ex.P-22 it was considered, that though it is registered, but it is executed by two widows of Ram Chander, and since the possession was with the defendants, the mention about delivery of possession in this document is obviously false, and since no title passed to Ram Chander vide Ex.P-21, no title could be passed by Ex.P-22 either. Then, it was considered, that out of the two executants, only one, viz. Godawari, was produced before the Sub Registrar, and that the document was not proved by producing the purchaser,

seller etc. It was also considered that the property being belonging to the minors, could not be sold without permission of the District Court, and no such permission has been produced. Then, on the same ground, as that of Ex.P-21, the sale deed Ex.P-23 was also not accepted. Thus, it was held, that since neither of the sale deeds confer any title on the plaintiffs, they cannot be granted decree for possession, and defendants cannot be said to be trespasser, on the face of provisions of Rules for Bapidars and Gair Bapidars. Since it was also considered, that there is total absence of evidence on the side of the plaintiffs, except the statement of Pratap himself, who was assumed to be sole architect of the case, being the scribe, attesting witness, and the plaintiffs, and keenly interested, and he was considered to be not a reliable witness. In the result the appeal was allowed, and the suit of the plaintiffs was dismissed, with respect to all the lands.

Aggrieved of this, the plaintiffs filed second appeal before the learned Board of Revenue, who partly allowed the same as above. The learned Board of Revenue also traveled on the same track, by getting involved into the various provisions of the rules, and considered, that the defendants were not ejected by initiating any proceedings in accordance with law, and it proceeded to agree with the findings of the learned Revenue Appellate Authority whole hog. The learned Board of Revenue

considered, that in original Khasra Girdawari of 2005, possession of defendants was entered against the Khasra No. 42 and 86, and that it was only after issuance of Bapi Patta, that the corrections were made, by entering the names of Patta holders. However, it proceeded to consider, that the Revenue Appellate Authority committed error in dismissing the entire suit, inasmuch as regarding land comprised in Khasra No. 44, neither any Gair Bapi Parcha was issued in favour of the defendants, nor defendants were shown in possession of this land in Khasra Girdwari, rather they were shown in possession of Khasra No. 42 and 86, for which they have been issued Gair Bapi Parcha. Then, regarding plaintiffs' title, it proceeded to consider, that one co-tenant could file a suit for ejectment of trespasser, and Omprakash, who is the plaintiff No.2, is one of the co-tenants, as Bapi Patta was issued in favour of Chuna, Samela and Omprakash, and therefore it was held, that decree can be passed in favour of Omprakash, so far as Khasra No. 44 is concerned, and accordingly the appeal was allowed to that extent.

Arguing the writ petition it was submitted by Mr. Acharya, by way of narration of facts, that the plaintiffs (their predecessor in interest being four persons) applied for grant of Patta, being in cultivatory possession, on 17.7.1948, whereupon on 20.7.48 public notice was issued

inviting objections (Ex. P-17 in the trial court and Annexure-1 in the writ petition), however, no objection whatever was submitted, and Patta was ordered to be granted, and it was granted on 23.2.1949. In the meantime on 11.11.48 a Gair Bapi Parcha was issued by Patwari in the name of defendants Balu and Karnia. It was pointed out that before Girdawari of Samvat 2005 there was no entry in any of the record about defendants' possession. It was then submitted that on the plaintiffs' complaint, correction was ordered to be made, and on the plaintiffs' application it was reported that Gair Bapi Parcha has erroneously been issued, and it was ordered to be corrected, and necessary amendments were made in the record. It was then submitted that the defendants challenged the Patta by way of filing appeal, which appeal and successive appeals were dismissed right up to the Board of Revenue. Thus, the Patta acquired finality. In these circumstances, it was submitted, that the plaintiffs filed the present suit for possession, wherein out of two defendants, defendant No. 2 Karnia admitted the plaintiffs' right. It was then submitted that the power of Tehsildar was upheld by this Court vide judgment in Balu Vs. Board of Revenue, reported in 1966 RLW-427. Then, it was submitted that the plaintiffs claim through Ram Chander and Uda, and Bapi Parcha was duly issued in the name of Uda on 13.11.1948, and that, even according to Sarpanch Madan Lal defendant has nothing to do with Khasra No. 44. Then, it was pointed out that in the

Girdawari of Samvat 2004, the land has been shown to be “Parat”, while in Samvat 2005 it was entered in the name of the petitioners' predecessor. Then, the statement of Balu, available on record of the trial court as Ex.P-25, was referred, wherein Balu defendant has deposed that he has nothing to do with the land in question, and that he is not in possession of the land. It was also pointed out that the defendants never applied for any Bapi Patta. With narration of these facts, assailing the impugned judgments, it was submitted, that the learned lower appellate authorities, being Revenue Appellate Authority, and the learned Board of Revenue, have not even touched the findings of the learned trial court on any aspect, including the grant of Patta having been made after public notice, so also about the fact that Patta had been upheld in all the three courts on appeal which amounts to res-judicata. Then, it was submitted that though in the earlier orders which culminated into judgment in 1966 RLW-427, the question gone into was about the jurisdiction of Tehsildar to grant Patta, but that was also examined on the facts of the present case, being that of grant of Patta, and therefore, that did include a question about the right of Tehsildar to grant Patta in the circumstances of the present case, and therefore, when the power of Tehsildar has been recognised, obviously the Patta stood re-affirmed, and the courts below were not entitled to embark upon the validity of Patta. Then, it was also pointed out that vide order dt. 9.4.52,

certified copy whereof is produced on record as Ex.P-28, which was passed in appeal against temporary injunction order, which is an order inter-parties, it was found, that the possession of the plaintiffs is evident from the record, and that the defendants are not able to show any right, except being in possession on the basis of Gair Bapi Parcha with them, and it was also noticed, that conduct of Hawaldar who granted this Gair Bapi Parcha, was in question, and was suspicious, so much so that that Hawaldar was suspended, and enquiry was going on against him for tampering with the Government record. According to the learned counsel, thus, the possession of the plaintiffs was established, and that the prayer for possession was made in the suit because the plaintiffs were dispossessed from Khasra No. 86, while since there was temporary injunction in favour of the plaintiffs, against the defendants, in the previous proceedings upto 15.4.49, the defendants were not in possession. It was also submitted that the trial court had clearly found, that the previous entries were corrected after grant of Gair Bapi Parcha, which was again duly altered on 25.2.49, after grant of Patta to the plaintiffs. Then, it was submitted that the learned Revenue Appellate Authority has catalogued findings of the learned trial court in para-7, but then has decided, that in the opinion of the learned authorities, even the Gair Bapi Parcha, coupled with actual possession, conferred better rights and title in comparison to Bapi Patta without occupation of

land, and then concluded, that the Patta could not be legally issued on 24.2.49, in respect of the land which was already under occupation of the defendants, for which they also held a Gair Bapi Parcha dt. 11.11.1948. It was contended that there is absolutely no evidence on record to show, that the possession was with the defendants, on the basis of which they could, or they were given Gair Bapi Parcha, while the learned Revenue Appellate Authority has simply catalogued some of the rules, which according to the authorities were relevant, and has concluded defendants to be in possession, simply on the basis of the fact of their having Gair Bapi Parcha, so much so that its cancellation, and issuance of Bapi Parcha on 13.11.48, has not at all been considered. Then, it was submitted that the defendant Balu had applied for being given permission to cultivate the land, which was also not granted.

Then, referring to the judgment of the learned Board of Revenue, it was submitted, that the learned Board of Revenue has also positively found in para-10 as under:-

> "It seems to us that on the strength of the ghair bapi parcha issued in his favour, the defendant No.1 Balu entered into possession of lands comprised in khasra Nos. 42 and 86."

Thus, even according to the learned Board of Revenue it was not that the defendants were in possession,

and on account of which they were granted Gair Bapi Parcha, as was assumed by the learned Revenue Appellate Authority, and even the Board of Revenue also did not disturb, or even touched, the findings of the learned trial court, and traveled on the same track on which the Revenue Appellate Authority traveled. It is submitted that learned courts below were labouring under basic misconception about requirement of cancellation of defendants' Gair Bapi Parcha, while as a matter of fact, rather the plaintiffs were in possession, and had applied for grant of Bapi Patta, and during interregnum period a Gair Bapi Parcha happened to be issued to the defendants erroneously, which error was sought to be, and was corrected, and as such there was no question of dispossession of defendants, and in this background, it was repeated that the defendants never applied for grant of Bapi Patta, as, even a Gair Bapidar has to make application for grant of Bapi Patta. Then, it was submitted that the finding of the learned Board of Revenue regarding entry in the Jamabandi of 2005 is incorrect. Then, learned counsel referred to the judgment of the learned trial court, so also Ex.P-29, and submitted, that the learned trial court referred to 145 proceedings wherein attachment was removed, and submitted, that the attachment was lifted only because of the statement of defendant Balu, about his having to do nothing with the land in question. Then, coming on the aspect of validity of transfer, it was submitted, that in the year

1949 Transfer of Property Act did not apply, and therefore, the requirement of delivery of possession was not relevant, and again it was submitted, that on 24.2.49 the possession was with Chuna and Samela, and they were having temporary injunction in the suit of Ramchander, while Balu has deposed, that he has nothing to do with the land. Then, it was submitted that the sale deed Ex.P-22 is registered, and the question of title could not be gone into by the learned trial court, apart from the fact, that regarding the question of grant of permission by the District Court, there is no cross-examination from the witness appearing on the side of the plaintiffs, apart from the fact, that even if it were to be taken, that the transfer was without permission, still it remains only voidable but not void.

Then, regarding Ex. P-23 it was submitted that since the present plaintiffs had come on record as legal representatives of Ramchander, the question of validity of alienation in favour of Ramchander no more survives, apart from the fact that on this question the learned Board of Revenue has already held, that even Omprakash alone could maintain the present suit. Then, the bias attitude of the Revenue Appellate Authority was highlighted, by making submission, that notwithstanding the fact that defendants have nothing to do with Khasra No. 44, the plaintiffs' suit, even in respect of that land was also dismissed. Reliance was placed on the judgment of Patna High Court, in

Bibi Raijan Khatoon & Ors. Vs. Sadrul Alam & Ors., reported in AIR 1996 Patna-156, and two judgments of Hon'ble the Supreme Court in The Dollar Company, Madras Vs. Collector of Madras reported in AIR 1975 SC-1670, and in SVR Mudaliar (Dead) by LRs & Ors. Vs. Mrs. Rajabu S. Buhari (Dead) by LRs & Ors., reported in AIR 1995 SC-1607 to contend, that reversing the judgment of trial court, the reasonings given by the learned trial court have to be met. Then, summing up the argument it was submitted, that the documents on record had not been seen, Bapi Patta is a document which was challenged, and that challenge having failed, it operates res-judicata, and in any case constructive res-judicata, Balu has given statement that the possession was not with the defendants, and the other defendants never appeared in the witness box, one of the persons mentioned in the Gair Bapi Parcha dt. 11.11.48, being Karnia, denied having any interest in the land, High Court's order in the judgment reported in 1966 RLW-427 should be held to have the effect of adjudication of validity of Patta, permission of cultivation was refused to Balu, and the last submission made is, that the Transfer of Property Act was not applicable in 1949.

On the other hand, learned counsel for the defendants, Shri Mehta, submitted, that the suit is filed on 13.5.49, by the three plaintiffs, for possession of all the three Khasras, and in that suit there is no reference

or pleading about any application having been given by the petitioner for grant of Patta, or any publication to have been issued thereon, and any Patta having been granted. Then, it was submitted that the said notice Annexure-1 has not been proved in accordance with law, apart from the fact that there is no endorsement therein about it having been affixed. In other words it does not appear to have at all been published, and thus there is no basis whatever, even to contend, that the plaintiffs were in old possession. Likewise, in the plaint there is no reference about the Parcha of 11.11.1948, and even of 13.11.48, or of the statement of Balu Ex.P-25. Then, it was submitted that in Samvat 2004 the land was lying fellow (Parat), and the defendants cultivated it in Samvat 2005, as found by the learned courts below, as a pure finding of fact. Then, it was submitted that the plaintiffs never came in possession of the land, as the defendants' Parcha is dated 11.11.48, and on 13.5.49 itself the suit has been filed. Then, it was submitted that vide judgment dt. 27.4.49 the appeals were dismissed as incompetent, which order was upheld on 23.2.53 by Additional Commissioner, and by the Board of Revenue vide judgment dt. 15.3.54. Thus, it cannot be said that there had been any adjudication about validity of Patta, and the question required to be gone into in the suit was, as to whether the Patta was rightly made, and could possibly be made. With posing these questions, the Rules for Bapidars and Gair Bapidars prevailing at the relevant

time were referred, and submitted, that it was rightly found, that even an occupier, even without authority of the landlord, was required to be dispossessed in accordance with the procedure prescribed therein, and any Khalsa land could be occupied. Then, it was submitted that in para-31 the Board of Revenue has examined the Girdawari and found that Girdawari of Samvat 2005 was corrected, and before correction the defendants' possession was shown therein. Then, Rule 50 was referred, to contend that the Rules relating to Bapidars are applicable to Gair Bapidars mutatis mutandis, and therefore, since the defendants were holding a Gair Bapi Parcha, whereas to entitle the plaintiffs to get Bapi Patta, it was sine qua non to evict the defendants by undertaking the procedure prescribed under the Rules. It was of course submitted, that there is no prohibition for grant of Bapi Parcha with respect to the land, for which some other party holds a Gair Bapi Parcha. Regarding ejectment of the person in occupation, reliance was placed on Rule 29, 30 and 34 of the aforementioned Rules. Then, it was submitted that episode of grant of Patta to the plaintiffs is an out come of fraud committed by Mool Raj, in collusion with the revenue authorities, and that, since the defendants have not been dispossessed, the petitioner's possession as shown in Bapi Patta and Girdawari before correction does show the plaintiffs' creation. Thus, there was no mistake to be corrected. Then, it was submitted that it is Pratap who is the sole

architect of the entire episode, inasmuch as, the assignment of 24.2.49 is scribed by this Pratapji, and this Pratap has become the plaintiffs, as the power of attorney holder, and has also appeared as witness for the plaintiffs. Then, it was submitted that it is clear from the statement of P.W.1 Pratapji, that the assignment Ex.21 is of undivided share in the land, which could not be sold, apart from the fact that there is no mention in the document at all about any delivery of possession of the land. Then, it was submitted that the manipulations are writ large, inasmuch as Ex.P-23 being Annexure-20B is a sale effected for Rs. 99/-, and in the same month, subsequently the sale of this land was effected for Rs. 500/- on 18.5.57, by Ram Chander to the plaintiffs. Thus, it is clear that there is manipulation, of which the Pratap is the chief architect, and thus no right ever stood conveyed to the plaintiffs. Regarding the statement of Balu Ex.P-25, it was submitted that there is no reference of the statement in the plaint or in the pleading, and have neither been produced on record, nor has been proved, nor even put to the defendants, or to his witness. Then, it was submitted that even the correction of Gair Bapi Parcha could not be effected without any proper order of the competent authority. Then, regarding dismissal of the suit with respect to Khasra No. 44 by the Revenue Appellate Authority, it was submitted that since it was the plaintiffs' suit, and the learned the Revenue Appellate

Authority found, that the plaintiffs are not able to establish their case, therefore, it could, and did, rightly dismiss it with respect to this land also. Then, reliance was reiterated on the judgment of Hon'ble the Supreme Court, in Brahma Nand Puri Vs. Neki Puri, reported in AIR 1965 S.C.-1506, to contend, that in order to succeed in a suit for ejectment the plaintiffs have to prove the case which he sets up, and cannot succeed merely on the weaknesses of the defendants. It was, however, submitted that in case Bapi or Gair Bapi Parcha are both validly issued, then Bapi Parcha is to prevail over Gair Bapi Parcha.

In rejoinder Mr. Acharya submitted, that notice Annexure-1 is dated 20.7.48, and in those proceedings the statement of the four persons were recorded on 26.8.48, being Annexure-2, which clearly shows, that they were in possession, and therefore, the Patta was granted, and thus it cannot be said, that the defendants were in possession of the land on 11.11.48, and therefore, immediately on 13.11.48 Gair Bapi Parcha was cancelled, and was issued in the name of the plaintiffs. Then, referring to the Girdawari of the year 2004, it was submitted that therein the names of the plaintiffs are entered. Then, it was again stressed that Balu has not appeared in the witness box. Then, to support the plea of constructive res-judicata reliance was placed on the judgment of Hon'ble the Supreme

court, in Devilal Modi Vs. Sales Tax Officer, reported in AIR 1965 SC-1150, State of Uttar Pradesh Vs. Nawab Hussain reported in AIR 1977 SC-1680, State of Kerala Vs. M.K. Kunhikannan reported in AIR 1996 SC-906, and Swamy Atmananda Vs. Sri Ramakrishna Tapovanam reported in AIR 1995 SC-2392.

Mr. Mehta by way of sur-rejoinder submitted, that there is no basis for raising plea of res-judicata, or constructive res-judicata, as there is no pleading in this regard, or no fact in this regard is there on record. Then, regarding the statement of Pratap, relying upon the judgment of Hon'ble the Supreme Court, in Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd., reported in (2004) 3 SCC-584, it was submitted that Pratap is only a power of attorney holder, and his evidence is of no consequence, as according to this dictum even the attorney can depose only such facts, as are in his personal knowledge.

I have considered the submissions, and have gone through the record.

Suffice it to say, that the learned trial Court has decided the matter issue-wise, and had noticed, that on 11.11.48 a Gair Bapi Parcha was issued to Balu and Karnia regarding Khasra No.42 and 86. Then on 13.11.48 Bapi Parcha was issued in favour of the plaintiffs. And that on report

of the Patwari, order was passed by the Revenue Inspector, on the basis of which, the Gair Bapi Parcha of defendants has been cancelled, and Patta was issued in favour of plaintiffs, and that, against grant of Patta, appeal was filed before the Dy. Commissioner, then Addl. Commissioner, and then to the Board of Revenue, which all upheld the Patta, and that upholding has not been challenged anywhere. It is in this background, that the issues had been decided by recording the findings, as briefly catalogued above. While the learned Revenue Appellate Authority, and the learned Board of Revenue have proceeded to examine the validity of the Patta granted to the plaintiffs, on the anvil of the question, as to whether the plaintiffs were in possession or not, and held, that in view of the fact, that defendants were having Gair Bapi Parcha of 11.11.48, and there is nothing to show that they were ever dispossessed, by taking any proceedings in accordance with law, the Bapi Patta could not be issued to the plaintiffs, as, the sine-qua-non for the issue of the Patta is, that the person should be tenant, meaning thereby, that he should be in occupation of the land.

In my view, the whole approach of the two learned Courts below, being Revenue Appellate Authority, and the Board of Revenue, has been entirely off the mark.

I may in this regard better start with the

pleadings of the parties, once again. A look at the plaint shows that the precise case of the plaintiffs was, that plaintiffs No.1 and 2, Uda Ram and Omprakash alongwith Chuna and Samela were granted Bapi Patta with respect to Khasra number mentioned in para-1 of the plaint on 22.2.49, and that on that land, Chuna and Samela were in Gair Bapi cultivation in Samvat 2005, for which, Parcha and Girdawari had been produced. To this pleading, the reply of the defendant No.1 is, that the Bapi Patta granted on 22.2.49 is under challenge in appeal, pending before the Addl. Commissioner, and effecting change in the revenue record is stayed, therefore, it is altogether wrong to contend, that the plaintiffs are having any Bapi Patta, and is not entitled to maintain any suit on that basis. Then it is pleaded that these lands were never in possession of the plaintiffs, or Chuna or Samela, and the Gair Bapi Parcha produced by the plaintiffs is wrong, correct Parcha was issued in favour of the defendants on 11.11.48, but plaintiffs in collusion with the authorities, have got issued Bapi Patta in their name, and got effected Girdawaries, and reports of the Revenue Inspector. Thus, the plaintiffs are not entitled to maintain the suit on that basis. Other pleadings of the plaint regarding alienation, earlier filation of the application by the plaintiffs for injunction, the plaintiffs' dispossession etc., need not detain me, for the simple reason, that the learned Board of Revenue has found, that notwithstanding

the alleged invalidity of the alienations, since even one of the co-owners could file the suit against trespasser, and since one of the plaintiffs is the original co-owner, the suit could be maintained, and as would be clear from the resume of submissions, made above, that this finding of the Board of Revenue has not been challenged before me by Mr. Mehta. Then of course, the plaint was amended subsequently, and amended written-statement was also filed, but then, that does not concern this part of the pleading. Then a rejoinder was filed by the plaintiffs, wherein it was contended, that there are no proceedings pending, wherein the Patta can be said to be sub-judice, and it was maintained, that the land was in possession of Chuna, and Samela, alongwith the plaintiffs No.1 and 2, who were given the Patta, and that Balu had fraudulently obtained Gair Bapi Parcha, with respect to Khasra No.42 and 86 only on 11.11.48, which was rejected on 13.11.48, and that, even according to Karnia, he and Balu has no possession over the land, and that the plaintiffs are entitled to maintain the suit on the basis of Bapi Patta. In my view, thus, the only stand of the defendants was, that the Patta is under challenge in appeal, which is sub-judice, and therefore the plaintiffs cannot maintain the suit.

Since the plaintiffs alleged that the land was in cultivatory possession of plaintiffs alongwith Chuna and Samela, and it was denied by the defendants, by pleading,

that it was not in their possession, and that Gair Bapi Parcha was correctly issued to the defendants in view of the land being in defendants' possession. In view of this state of pleadings, to say the least, there was no challenge on the side of the defendants to the plaintiffs' Patta, on the grounds, on which the learned Revenue Appellate Authority and the learned Board of Revenue, have considered, and have discussed long, and arrived at the conclusions. In other words, rather to repeat, the only challenge was, that since Patta is under challenge in appeal, the plaintiffs cannot maintain the suit, while as the things have transpired now, that admittedly all those appeals, after appeals, have been dismissed, and that dismissal has become final. In the above background it is also significant to note, that in the present case, there is no counter-claim whatever on the side of the defendants, for setting aside the plaintiffs' Patta, and/or for a declaration of the defendants' title, on the basis of their Gair Bapi Parcha. In that view of the matter, since admittedly Bapi Patta is there, and since as conceded by Mr. Mehta that if Bapi Patta, and Gair Bapi Parcha are both validly issued, the Bapi Patta is to prevail, in absence of any challenge to the validity of Bapi Patta, on the grounds as considered, and found by the learned Revenue Appellate Authority, and the learned Board of Revenue, and in view of the appeals against that Bapi Patta having been dismissed, the obvious conclusion is, that the Bapi Patta has to

prevail over the Gair Bapi Parcha, and the suit could not be dismissed, on the grounds, as dismissed by learned Board of Revenue, and the learned Revenue Appellate Authority.

This being the position, the entire remaining exercise is, for all intent and purposes, an exercise in futility, and the suit having been filed shortly after the Patta i.e. less than three months, the suit was, and is required to be decreed whole hog.

Notwithstanding above, not to run away from the controversy, as argued, and as considered by the learned Revenue Appellate Authority, and the learned Board of Revenue, despite being not necessary, I may still deal with the aspects considered by the learned Authorities below.

From a look at the rules, as reproduced by the learned authorities below, it is of course clear, that anyone could occupy and/or cultivate the land, and in that event such cultivator of occupier would be Gair Khatedar, and Gair Khatedar was required to be evicted in accordance with the procedure given therein, and that for getting Bapi Patta, the person has to be tenant in any case. If the matter were to be examined on this aspect also, the million dollar question, requiring to be adjudicated is, as to whether the plaintiffs were in possession of the land prior to grant of Gair Bapi Parcha to the defendants, or the

defendants were occupying the land, even within the meaning of the rules, being Rule 51, including its Explanation, on account of which, they have been granted Gair Bapi Parcha, so as to enable the defendants to contend, that unless they were ejected in accordance with law, no Bapi Patta could be issued to the plaintiffs. In this regard, the pleadings of the parties have already sufficiently been recapitulated above, and coming to the evidence, on the side of the plaintiffs, plaintiff Pratap himself appeared, who has deposed that he is the plaintiff in the suit, and is Power of Attorney of some of the other plaintiffs, and that Uda Ram was his real brother, who has died, he is Power of Attorney of his sons only. With this background, he has clearly deposed, that he is himself looking after the lands since beginning, and has deposed to be knowing the lands in dispute being Khasra No.42, 44, 58 and 86, which were in cultivation of Uda Ram (his brother), Omprakash, Chuna and Samela, and that they were given Gair Bapi Parcha Ex.P/2, and Bapi Patta was issued to them on 22.2.49, being Ex.3. Then he has deposed that the Gair Bapi Parcha, which was erroneously issued, was corrected, for which necessary orders were passed, and after grant of Patta, necessary mutations were effected. He has also deposed, that at the time of submitting application for Bapi Patta, the land was in their possession, and in that regard, the notice Ex.P/17 was issued, in response to which, no objections were submitted, and the Patwari, thereupon submitted his report

Ex.P/18, reporting that the land is in possession of the applicants. Then he has proved the orders Ex.P/19 and 20, being the orders dismissing the appeal against Patta, which appeals were filed by the defendants. What is significant to note is, that in the entire cross-examination, there is not a word suggested, that he, or the plaintiffs, were not in possession of the land as deposed by him in examination-in-chief, or even that the defendants were in possession, on account of which he was issued Gair Bapi Parcha. In other words, on the principle of non-traverse, in cross-examination, the statement of this witness Pratap go un-assailed about the plaintiffs being in possession in the year 1948, at the time when they filed application for grant of Bapi Patta. In this sequence, coming to the defendants' evidence also, though the defendants have produced number of witnesses, but then Balu himself has not come in the witness-box at all, to depose even by bare word of mouth, that he was in possession of the land, on the basis of which, he was issued the Gair Bapi Parcha on 11.11.48. Pratap has proved the previous statement of Balu-defendant as Ex.P/25, and on that also, there is not a word in the cross-examination. In such circumstances, to say the least, the only possible conclusion is, that the defendants have failed to rebut the plaintiffs' evidence, about being in possession, on the basis of which, they moved the application for grant of Bapi Patta, and have also failed to establish, that Gair Bapi Parcha was issued to the

defendants, on account of their being in possession. Then significantly this witness has also not been cross examined on the orders dismissing appeals, challenging patta, which were proved by him in his examination in chief.

I may then deal with the criticism leveled against Pratap by Mr. Mehta during course of arguments viz., on the basis of judgment of Hon'ble the Supreme Court in Janki Vasudev's case, about his being Power of Attorney Holder only, and Power of Attorney being not capable of deposing the facts, other than what are within his personal knowledge, and this Pratap being the chief architect of the entire episode. Suffice it to say, that so far Janki Vashdeo's case is concerned, Pratap is himself the plaintiff, and is holding Power of Attorney on behalf of his sons, and has deposed facts on the basis of his personal knowledge, apart from the fact, that even on this aspect, he has not been cross-examined, and so far as he is being the chief architect is concerned, in this regard also, not a word has been suggested to him to discredit his testimony.

In that view of the matter, it cannot be said, that for the purposes of the various provisions of the rules, quoted and relied upon by the learned Revenue Appellate Authority, and the learned Board of Revenue, the plaintiffs were not in possession, so as to be not entitled

to be granted Bapi Patta, more so, without ejecting the defendants in accordance with the procedure prescribed.

At this place, I may immediately gainfully revert to the finding of the learned Board of Revenue quoted above, wherein the Board of Revenue has categorically found, that it seems to them, that on the strength of Gair Bapi Parcha, issued in favour of the defendant No.1, he entered into possession of the land comprised in Khasra No.42 and 86. Thus, with this finding, countenancing Gair Bapi Parcha of the defendants, rather clearly amounts to putting the cart before the horse, inasmuch as, Gair Bapi Parcha could be issued on the basis of occupation, and it could not be other way round, that the defendants procured Gair Bapi Parcha, and then on its strength, enter into possession. Even this finding of the Board of Revenue had not been assailed, during course of arguments, by learned counsel for the defendants Shri Mehta.

Thus, even on this finding itself, the very basic reasoning given by learned Courts below, about invalidity of the plaintiffs' Patta, stands knocked down.

In view of the above, the submission of learned counsel for the petitioner, Mr. Acharya, again acquires significance, that the learned Revenue Appellate Authority, and the learned Board of Revenue, have passed the

judgments, without even dealing with the findings of the learned trial Court, much less setting it aside, which in the circumstances of the present case, definitely vitiates the judgments.

In view of my above conclusions, I need not detain now on the various authorities cited on either side.

So far as writ No.1103/86 is concerned, nothing was submitted on the side of the defendants, as to how the finding of the learned Board of Revenue, with respect to Khasra No.44, or about the right of the plaintiffs to maintain the present suit, in view of one of the plaintiff Pratap being co-owner, is vitiated, rather nothing was submitted to support this writ No.1103/86.

The net result is, that the writ No.1103/86 is dismissed, while writ No.1457/86 is allowed. The judgment of the learned Revenue Appellate Authority being Annex.24 dated 8.1.79 is set aside, and that of the learned Board of Revenue dated 8.4.86 being Annex.28, so far it dismisses the plaintiffs' suit, regarding Khasra No.42 and 86, is set aside, and the plaintiffs' suit is decreed in toto. The parties shall bear their own costs of these writ petitions.

(N P GUPTA),J.

/Sushil/